Supreme Court, U.S.
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No. 99-594

In The Supreme Court Of The United States

KANE FISHER AND SALVORS, INC., et al., Petitioners,

v.

UNITED STATES OF AMERICA, Respondent.

Amicus Curiae Brief in Support of Petition by Southeastern Fisheries Association, Inc. and Monroe County Commercial Fishermen

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit,

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QUESTIONS PRESENTED

I.

Whether the admiralty right to salvage, and other user rights, are automatically invalidated upon the designation of a National Marine Sanctuary by Congress prior to the subsequent promulgation of rules and regulations for approval by Congress, and when applicable the State, that will govern the sanctuary and salvage activities upon taking effect?

II.

Whether a right of maritime salvage constitutes a federal law within the meaning of 16 U.S.C. § 1443 providing a "person may avoid liability" for injury to the sanctuary "caused by an activity authorized by federal or state law"?

AMICUS CURIAE LIST OF PARTIES

Amicus Curiae parties are Southeastern Fisheries Association, Inc. and Monroe County Commercial Fishermen. There are no parent companies or subsidiary companies.

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I. THE PETITION FOR WRIT OF CERTIORARI SHOULD BE GRANTED

A. Leave to file *Amicus Curiae* Brief Granted by Parties

Counsel for the Petitioners and the Solicitor General for the Respondent have consented pursuant to Supreme Court Rule 37 for the Southeast Fisheries and Monroe County Commercial Fishermen to file an *Amicus Curiae* Brief in Support of the Petition.

B. Interest of *Amicus Curiae*

This Brief in Support is filed on behalf of the two fishermen groups representing ninety percent (90%) of the commercial fishermen operating in the Florida Keys National Marine Sanctuary. Sixty-five percent (65%) of the Sanctuary is within the State of Florida. The livelihood of the fishermen, indeed the viability of the Keys fishing industry, is dependent upon fair and reasonable rules and regulations for the Florida Keys Sanctuary.

The critical Question Presented directly concerns fishermen and others who use the Sanctuary for their livelihood. *Whether proposed rules and regulations for the Florida Keys Sanctuary, after prior opportunity for public input, must be submitted to Congress and to Florida for consideration and possible objection before implementation of the Sanctuary may take effect.* The opportunity for input concerning proposed rules and the review by Congress and Florida is of life or death importance to the fishermen's economic existence.

The Florida Keys Sanctuary was designated by an act of Congress on November 16, 1990. The implementation of

rules and regulations for the Sanctuary to take effect occurred on July 1, 1997. 62 F.R. 32154 (June 12, 1997); 62 F.R. 36655 (July 9, 1997). During this interval substantial activity by all segments of users occurred in the area encompassed by the proposed Sanctuary. This activity included not only Petitioner Kane Fisher's salvage efforts in 1992, but also even more substantial activity by commercial fishermen and numerous other business or pleasure entities. The concerns of commercial fishermen and other Sanctuary users were addressed at numerous public hearings prior to the promulgation of rules. See discussion of NOAA's public representation, *infra* pp. 7-11.

Florida's objections accepted by NOAA included the Protocol for Cooperative Fisheries Management. 62 F.R. 32156. The existing regulations are subject to future changes and modifications. By virtue of the Eleventh Circuit ruling and NOAA's representations to the Eleventh Circuit (that submission of proposed rules is not required for implementation of the Sanctuary), the questioned right of public input and right of Florida to review and to object to future changes continues to be a matter of substantial importance.

C. Eleventh Circuit's Ruling and NOAA's Position Contradicts Purpose of Act for Public Input Prior to Implementation

The determinative issue is the nature and requirement under the Keys Sanctuary Act Section 7 for submission of proposed rules, after opportunity for public input, to Congress and the State of Florida for the Sanctuary to take effect under 16 U.S.C. § 1434(b). The Eleventh Circuit in its opinion affirming preliminary injunction in 1994 expressly ruled that because the Sanctuary had been designated by Congress, instead of the Secretary of Commerce, there is no requirement to submit proposed rules to Congress and to Florida for "implementation"

of the Sanctuary to "take effect." *United States v. Fisher, et al.*, 22 F.3d 262, 267-269 (11th Cir. 1994). This ruling was based upon NOAA's representation of regulatory expertise in interpreting the federal statute.

Notwithstanding NOAA's representation to the Eleventh Circuit on the preliminary injunction appeal, NOAA did exactly the opposite by submitting proposed rules in accordance with Section 7(a) of the Act to Congress and to the State of Florida and then making changes in accordance with Florida's objections. 62 F.R. 32154 (June 12, 1997). The Federal Register excerpts recognize that implementation did **not** "take effect" until July 1, 1997 and not the date found by the Eleventh Circuit of November 16, 1990, when the Keys Sanctuary Act was signed. (See Appendix 1, *infra.*) What is even more amazing, NOAA continued to advise the Eleventh Circuit in 1998, on appeal of the Final Judgment, that there was no obligation to submit proposed rules. NOAA asserted that the rules only had been submitted as an accommodation. (See portions of NOAA's 1998 Eleventh Circuit Brief in Appendix 2, *infra.*)

Recognizing their zeal to win and duty of vigorous representation, government counsel still should be held to at least a fair standard of candor and integrity in representations to the courts. This is particularly true in this case because of the judicial deference accorded government counsel and their "regulatory expertise in statutory interpretation." As a result of this judicial deference, the Eleventh Circuit by its 1999 per curiam affirmance awarded the articles of salvage to NOAA and upheld $600,000 in damages that occurred prior to the effective date of any rule or regulation. This result perpetuated the ruling that submission of proposed rules is not required by the Keys Act.

The Eleventh Circuit's ruling contravenes not only the terms of the 1990 Florida Keys Sanctuary Act and the provisions of the 1997 rules and regulations, it also produces an apparent absurdity of reasoning: If maritime salvage, otherwise lawful, was made per se illegal by the mere passage of the Keys Sanctuary Act, it would follow that anyone who took a fish (a Sanctuary resource) between 1990 and 1997 also violated the Act.

This absurdity, however, is not far fetched. NOAA had considered regulations proposing "virtually closing down commercial and recreation fishing and prohibiting many other recreational uses."[1] This proposal was rejected in favor of a more moderate approach to gain public support for the Sanctuary. This underscores the importance of public input and the approval process by Congress and Florida. It further underscores due process principles of why enforcement must follow and not precede approval of rules.

There would be no absurdity, however, if the Sanctuary Act and the subsequent rules and regulations are fairly, properly and, indeed, literally applied. Review by this Court is needed to secure the right by Sanctuary users, including salvors, fishermen and others, for input and further protection through review by Congress and Florida.

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[1] Strategy for Stewardship, Florida Keys National Marine Sanctuary, Final Management Plan: An Overview, p. 2 (1996).

D. Sanctuary Act – Right of Public Input – Approval and Implementation

It would be difficult to draft a statute and rules and regulations that could be more clear in respect to users' rights and date of implementation. This is best demonstrated by looking at the statute and rules. Section 7(a) of the Florida Keys Sanctuary Act states "[I]n developing the plan and regulations, the Secretary of Commerce shall follow the procedures" of 16 U.S.C. § 1434(b). This procedure unequivocally requires submission to Congress and, when applicable, to the State before implementation of the Sanctuary may take effect. The rules and regulations published in the Federal Register expressly acknowledge that they were submitted in accordance with § 1434(b). [Section 304 of the 1972 National Marine Sanctuary Act] (See Appendix 1, *infra*.) The right of Florida to object was recognized and accepted. The rules and regulations proclaimed that they took effect on July 1, 1997. Section 922.167 acknowledged that the relevant time for determining prior use is July 1, 1997, the date of implementation of the Sanctuary, not November 16, 1990, the date of passage of the Sanctuary Act.[2]

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[2] § 922.167(a)(1)

(a) A person may conduct an activity prohibited by §§922.163 or 922.164 if such activity is specifically authorized by a valid Federal, State, or local lease, permit, license, approval, or other authorization in existence on July 1, 1997, or by any valid right of subsistence use or access in existence on July 1, 1997, provided that:

(1) The holder of such authorization or right notifies the Director, in writing, within 90 days of July 1, 1997, of the existence of such authorization or right and requests certification of such authorization or right.

The Act and rules recognize prior existing use activity, not otherwise unlawful, may continue until modified or otherwise restricted by the implementation of rules and regulations.[3] Prior to Sanctuary implementation parties are subject to all existing laws. Thus, if the salvage in question had occurred within the boundaries of the Dry Tortugas National Park (an area surrounded but excluded from the Keys Sanctuary)[4] penalties and sanctions for violations of the Archeological Resources Protection Act could be imposed under 16 U.S.C. § 470(b)(b).

The fishing industry in Florida is extensively regulated by various federal and state laws. If fishing activity prior to implementation occurred within the proposed boundaries of the Sanctuary violated any existing law and regulation, appropriate penalties could be applied. Sanctions and penalties under the Sanctuary Act, 16 U.S.C. §§ 1443 and 1447, however, would not be applicable until implementation of the Sanctuary (July 1, 1997). Any violation by fishermen or salvors after the July 1, 1997 effective date would, of course, subject the violator to penalties under the Sanctuary statutes.[5]

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[3] 16 U.S.C. § 1434(c); see also Florida Keys National Marine Sanctuary Act, §§7(a)(1) and 7(b); 62 F.R. 32154, 32161 (June 12, 1997). See also § 922.166.

[4] 15 CFR § 922.161, 62 F.R. 32161 (June 12, 1997).

[5] The Petitioners (Fisher, et al.) position appears to be in the alternative. No claim exists under 16 U.S.C. § 1443 and § 1447 because implementation of the Keys Sanctuary did not take effect until after the salvage activity had ended, and if the Sanctuary is deemed implemented as of the date of the Act, no liability exists under § 1443 because maritime salvage was an activity authorized by federal law that had not been otherwise restricted or barred at the time and place in question.

The Eleventh Circuit's ruling (based upon NOAA's arguments) that designation by Congress constitutes implementation of the Sanctuary is directly contrary to NOAA's pronouncement in the Federal Register. The Secretary still must "implement designated sanctuaries":

> The authority of the Secretary to designate national marine sanctuaries and implement designated sanctuaries was delegated to the Under Secretary of Commerce for Oceans and Atmosphere . . .

62 F.R. 32154 (June 12, 1997).[6]

The only support for the Eleventh Circuit's opinion (that submission of proposed rules to Congress and to Florida is not required by the Keys Sanctuary Act) is the self-proclaimed expertise of NOAA in statutory interpretation. This expertise, at least in reference to the Keys Act, would seem to be repudiated completely by NOAA's double standard in submitting proposed rules and regulations governing activity after July 1, 1997. These rules do constitute federal law.

NOAA also has taken an entirely different position with the public than with the Eleventh Circuit. The government's (NOAA's) successful duplicity is well documented by its own publications:

> The National Marine Sanctuaries Act (NMSA) and the Florida Keys National Marine Sanctuary and Protection Act of 1990 (FKNMSPA) mandate the development of a

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[6] See also 16 U.S.C. § 1433(a):

(a) The Secretary may designate any discrete area of the marine environment as a national marine sanctuary and **promulgate regulations implementing the designation** if the Secretary— (emphasis added)

comprehensive management plan that protects Sanctuary resources and facilitates Sanctuary uses that are compatible with the primary objective of resource protection.[7]

* * *

During the lengthy public review process for the DMP/EIS, NOAA received over 6,414 written and verbal comments on the draft plan and has given those comments full consideration in developing the FMP/EIS. In addition, the Sanctuary Advisory Council commented on the draft plan. Those comments have been given considerable weight in the development of the Final Plan.[8]

* * *

There has never been a more public process in the development of a management plan in the history of National Marine Sanctuaries. Literally thousands of individuals and organizations have contributed and commented on various aspects of this plan. In a bottoms-up planning process, a Sanctuary Advisory Council consisting of 22 stakeholders, agency representatives, and citizens worked diligently with Sanctuary staff and an Interagency Core Group to develop this final plan. The process took thousands of people hours to complete and is unparalleled in scope

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[7] Florida Keys National Marine Sanctuary, Final Management Plan/ Environmental Impact Statement, Vol. I of III, p. 9, U.S.Gov't. Printing Office, 1996, 755-004/45001A

[8] *Ibid.*

> regarding public participation at the State and local level.[9]

The Eleventh Circuit's ruling (urged by NOAA) stands in stark contrast with the reality of what NOAA was telling the public, that public input and Florida's approval are essential. The Eleventh Circuit, echoing NOAA's representation to the Court, stated:

> There is a sound practical reason why, in the Florida Keys Act, Congress designated the Florida Keys Sanctuary effective immediately and did not delay the effectiveness of the designation for a stated period, as it did in sanctuaries designated by the Secretary under the Sanctuaries Act. In the latter situation, the 45-day delay of the taking effect of the Secretary's designation was designed to give Congress the Opportunity disapprove 'any of [the designations] terms,' (16 U.S.C. § 1434(b)) and the public the opportunity to make its views known. Where, however, Congress itself made the designation, there was no need or occasion for such delay. The public already has had the opportunity to comment upon the legislation while it was pending before Congress, and Congress fully considered the terms of the designation before the Act was enacted.

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[9] Strategy for Stewardship, Florida Keys National Marine Sanctuary, Final Management Plan: An Overview, p. 2 (1996).

> Although the Florida Keys Act requires the Secretary to develop, with public participation, a management plan for the Florida Keys Sanctuary, there was no reason for Congress itself to review that plan after the statute became effective, and no indication that Congress reserved the right. Indeed, in view of the Congressional concern over effectively protecting the Florida Keys Sanctuary that led Congress in the Florida Keys Act itself to create the sanctuary, it is difficult to believe that Congress would have delayed implementation of the sanctuary for the 30 months the Secretary had to promulgate a management plan. This 30-month period stands in sharp contrast to the 45 days that Congress has to review and possibly disapprove the Secretary's designation of a sanctuary under the Sanctuaries Act.

United States v. Fisher, et al., 22 F.3d 262, 267 -268.

In its 1996 publication efforts to gain public acceptance and Florida's approval, NOAA's answer to a supposed question (drafted by NOAA) is exactly opposite what it told to the Eleventh Circuit and what the Eleventh Circuit held:

> Question #6: While these REGULATIONS appear to be reasonable, I am concerned that more restrictive regulations will be put in place in the future.
>
> Answer: Sanctuary Managers have very limited authority to unilaterally establish regulations. Except for restricted access to a limited area in the event of an emergency, all changes to Sanctuary regulations will require much the same process as the development of

> this final plan including public notice and comment before a change can occur. Even emergency closures will require consultation with the Governor who will have the ability to appeal closures in state waters.[10]

Review by this Court is needed. The destruction by the Eleventh Circuit of the vital right of the public, including salvors and fishermen, to provide public input should not be allowed to stand. The right of public input would be without protection if NOAA's submission of rules and regulations to Congress and to Florida were permissive instead of being mandatory. The equally important right of salvors, fishermen and other users to have notice of what is and what is not proscribed would seem mandated by fundamental principles of due process.

The Petitioners were not charged with violation of any promulgated rule or regulation of the Florida Keys Sanctuary. What is frightening from the perspective of fairness and due process is that by virtue of the mere passage of the Keys Sanctuary Act prior to its implementation, and without any violation of the Act's terms, Petitioners were fined and their salvage ordered confiscated. If NOAA can do this to one user, it can do so to others as it chooses. When a governmental agency is not adhering to principles of rules of law, the only recourse under our governmental system is through the judicial branch.

The Eleventh Circuit opinion has spawned conflicting and inconsistent positions and understandings, creating uncertainty of important rights. Even if a neutral observer would characterize the government's (NOAA's) arguments to the Eleventh Circuit as untenable, inexcusable, or ridiculous, this is of no moment. The Eleventh Circuit has accepted and

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[10] *Id.* at 23.

endorsed the argument. The Eleventh Circuit's view is of great moment to not only federal courts exercising jurisdiction over the Sanctuary but also to all past and future users – fishermen and salvors included.

Only this Court can protect this public interest by proclaiming that the Florida Keys Sanctuary Act mandates submission of proposed rules and regulations, with opportunity for public input, before implementation takes effect. In the United States "law" is considered a restriction on previously unrestricted rights. In other nations "law" is often a grant of a restricted license from all the powers held by the sovereign government. Congress authorized no restriction on previously unrestricted rights in the Florida Keys Sanctuary without State of Florida and congressional review of proposed rules and regulations. It *is* that simple.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Rules and Regulations, Department of Commerce, 62 FR 32154

62 FR 32154-01

1997 WL 311295 (F.R.)
(Cite as: 62 FR 32154)

RULES and REGULATIONS

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

15 CFR Parts 922, 929, and 937

[Docket No. 9607292-6192-03]

RIN 0648-AD85

Florida Keys National Marine Sanctuary Final Regulations

Thursday, June 12, 1997

***32154** AGENCY: Office of Ocean and Coastal Resource Management (OCRM), National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Department of Commerce.

ACTION: Notice of effective date; modifications to final rule.

SUMMARY: Pursuant to the Florida Keys National Marine Sanctuary and Protection Act and the National Marine Sanctuaries Act, NOAA developed the comprehensive final management plan for the Florida Keys National Marine Sanctuary (FKNMS or the Sanctuary). NOAA issued final regulations on January 30, 1997, to implement that plan and govern the conduct of activities within the Sanctuary. Congress

and the Governor of the State of Florida (Governor) had forty-five days of continuous session of Congress beginning on the day on which the final regulations were published to review those regulations and management plan. After the forty-five day review period, the regulations would become final and take effect, except that any term or terms of the regulations or management plan the Governor certified to the Secretary of Commerce as unacceptable would not take effect in the area of the Sanctuary lying within the seaward boundary of the State.

During the forty-five day review period the Governor submitted to the Secretary of Commerce a certification that implementation of the management plan and certain regulations were unacceptable unless specific amendments were made to the regulations. In response to the Governor's certification, NOAA amended those regulations certified as unacceptable to incorporate the Governor's changes. Consequently, upon their effective date the regulations, as modified by this notice, and management plan, in their entirety, will apply throughout the Sanctuary, including within State waters of the Sanctuary.

This notice amends the regulations published in the January 30, 1997, Federal Register, in response to the Governor's certification, and announces the effective date of the regulations.

EFFECTIVE DATE: The final rule published on January 30, 1997, at 62 FR 4578 and the revision of 15 CFR part 922, subpart P in this document are effective July 1, 1997.

ADDRESSES: Requests for a copy of the FMP/EIS, the Final Regulatory Flexibility Analysis, or the Federalism Assessment should be submitted to the Sanctuary Superintendent, Florida Keys National Marine Sanctuary, P.O. Box 500368, Marathon, Florida 33050.

FOR FURTHER INFORMATION CONTACT: Billy Causey, Sanctuary Superintendent, 305/743-2437 or Edward Lindelof, East Coast Branch Chief, Sanctuaries and Reserves Division, 301/713-3137 Extension 131.

SUPPLEMENTARY INFORMATION:

I. Introduction

The FKNMS was designated by an act of Congress entitled the Florida Keys National Marine Sanctuary and Protection Act (FKNMSPA, Pub.L. 101-605) which was signed into law on November 16, 1990. The FKNMSPA directed the Secretary of Commerce to develop a comprehensive management plan and regulations for the Sanctuary pursuant to sections 303 and 304 of the National Marine Sanctuaries Act (NMSA) (also known as Title III of the Marine Protection, Research, and Sanctuaries Act of 1972), as amended, 16 U.S.C. 1431 et seq. The NMSA authorizes the development of management plans and regulations for national marine sanctuaries to protect their conservation, recreational, ecological, historical, research, educational, or aesthetic qualities.

The authority of the Secretary to designate national marine sanctuaries and implement designated sanctuaries was delegated to the Under Secretary of Commerce for Oceans and Atmosphere by the Department of Commerce, Organization Order 10-15, s3.01(z) (Jan. 11, 1988). The authority to administer the other provisions of the NMSA was delegated to the Assistant Administrator for Ocean Services and Coastal Zone Management of NOAA by NOAA Circular 83-38, Directive 05-50 (Sept. 21, 1983, as amended).

II. Forty-Five Day Review Period Under the National Marine Sanctuaries Act

NOAA published the final Sanctuary regulations on January 30, 1997, (62 FR 4578) to implement the management plan and govern the conduct of activities within the Sanctuary. Under the NMSA, Congress and the Governor had forty-five days of continuous session of Congress beginning on the day on which the final regulations were published to review the terms of designation (i.e., management plan and regulations). After forty-five days, the regulations would become final and take effect, except that any term or terms the Governor certified within the forty-five day period to the Secretary of Commerce as unacceptable would not take effect in the area of the Sanctuary lying within the seaward boundary of the State. Congress could also act on the terms of designation. The following discusses the Governor and Congress' actions during the forty- five day period and corresponding modifications to the final regulations made by NOAA in response to those actions.

Certification by the Governor of Florida

On March 20, 1997, during the forty-five day review period under the NMSA, the Governor of the State of Florida certified by letter to the Secretary of Commerce that implementation of the management plan and certain regulations were unacceptable in State waters. However, the management plan and regulations certified as unacceptable would be acceptable if NOAA amended the regulations and the Co-Trustees Agreement for Cooperative Management (Co- Trustees Agreement), contained in the management plan, as requested in the Governor's certification letter. NOAA has amended the regulations and the Co- Trustees Agreement to incorporate the modifications requested by the Governor in his letter. By doing so, the regulations and management plan, as modified, are accepted